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No. 1073

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In the Supreme Court

of the

United States

October Term 1966

LAURENCE COLBRESE, JR.,

Petitioner,

vs.

NATIONAL FARMERS UNION PROPERTY AND CASUALTY COMPANY,

Respondent.

Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals

---

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Petitioner prays that a Writ of Certiorari issue to review a judgment of the Ninth Circuit Court of Appeals which reversed a judgment of the District Court of the United States for the District of Montana, ordered a final judgment entered for respondent, and which in the opinion of petitioner is clearly in direct conflict with a prior controlling decision of the Montana Supreme Court.

OPINION BELOW

National Farmers Union Property and Casualty Company v. Laurence Colbrese, Jr., 9th C.C., 368 F.2d 405 (1966).

OPINIONS BELOW

The sole legal issue of applicable Montana law was decided by the District Court in denying a motion by respondent for summary judgment, the opinion being reported at *227 F. Supp. 978.* The subsequent findings of fact, conclusions of law, and opinion of the District Court granting judgment to petitioner are not reported *(Appendix A, 1-19).* The opinion of the Ninth Circuit court reversing is not yet reported *(Appendix A, pp. 20-35).*

JURISDICTION

The action was filed in the Montana United States District Court under *Title 28, U.S.C.A., Sec. 1332,* by reason of diversity of citizenship. Judgment of the District Court in favor of petitioner was entered September 7, 1965. Following denial of a petition for rehearing, judgment of the Ninth Circuit Court reversing and rendering final judgment against petitioner was entered December 13, 1966 *(Appendix A, p. 37).* Jurisdiction of this Court is invoked under *Title 28, U.S.C.A., Sec. 1254(1).*

QUESTIONS PRESENTED

A single legal issue is involved. A statute of the State of Montana governing transfer of ownership of a motor vehicle provided in part:

> "(d) Until said registrar shall have issued a certificate of registration and certificate of ownership and statement as hereinbefore provided, delivery of any motor vehicle shall be deemed not to have been

made and title thereto shall not have passed and said intended transfer shall be incomplete and not be valid or effective for any purpose." *(53-109(d), R.C.M. 1947.)*

In *Safeco Ins. Co. v. Northwestern Mutual Ins. Co., 1963, 142 Mont. 155, 382 P.2d 174*, the Montana Supreme Court applied the foregoing section to govern the meaning of the terms "owned" and "non-owned" as used in liability insurance contracts covering motor vehicles. The controlling facts of *Safeco* are identical with this case, although the cases differ in many other respects.

United States District Judge W. J. Jameson, formerly a Montana practitioner, investigated to determine the basis of the decision of the Montana Supreme Court in *Safeco:*

a. "Admittedly the factual situation here is distinguishable in many respects. Accordingly, it becomes important to determine the basis of the court's decision in the Safeco case. In this connection I have examined the briefs of all parties, including one filed by amicus curiae, in the Safeco case." *(227 F. Supp. at 980-981.)*

* * *

b. "Here in effect counsel are asking this court to 'forecast' a modification of the interpretation of a Montana Statute and comparable insurance policy made by the Montana Supreme Court in Safeco. Under my interpretation of what the Montana Supreme Court held in Safeco, the abstention doctrine fortifies my conclusion that defendant's motion for summary judgment must be denied." *(227 F. Supp. at 983.)*

c. "I am still of the opinion that in the absence of any further construction of the Montana statute by the Montana Supreme Court Safeco is controlling."
(Appendix A, p. 19.)

The Ninth Circuit Court agreed that the particular vehicular transfer involved is governed and controlled by the requirements of *Section 53-109, R.C.M. 1947,* but held:

a. "We do not believe, however, that our foregoing conclusion is dispositive. As we read section 53-109(e), its only effect is that legal title to an automobile cannot pass to a voluntary transferee in the absence of compliance with the statutory procedure. Since there was no such compliance here, legal title did not, 'for any purpose,' pass to Albert Kinney. The crucial question is not the identity of the holder of the legal title but whether or not the car was 'non-owned' by Kinney as the term is employed in the insurance contract."
(Appendix A, pp. 27-28.)

b. "Appellee argues that, despite the fact that this court might be disposed to allow the controversy to turn on the meaning of the concept of ownership as it was employed by the parties to the insurance contracts in question, we are bound by the decision in Safeco Insurance Co. v. Northwestern Mutual Ins. Co., supra, to affirm. If Safeco had decided the very question involved in the instant case, we would, of course, be constrained to follow."
(Appendix A, p. 30.)

The very question was considered and decided by the Montana Supreme Court in *Safeco,* and the foregoing decision by the Ninth Circuit Court is in direct conflict.

Accordingly, the questions presented are:

1. Does the opinion of the Ninth Circuit Court in this case *(Appendix A, pp. 20-35)* contradict and con-

flict with the prior controlling decision of the Montana Supreme Court in *Safeco (142 Mont. 155, 382 P.2d 174)* and nullify the specific language of *Section 53-109(d), R.C.M. 1947?*

2. Did the Montana Supreme Court in *Safeco* decide the precise question of whether the meaning of the concept of ownership of a motor vehicle as it was employed by the parties in the insurance contracts in question was governed and controlled by the provisions of *Section 53-109, R.C.M. 1947?*

3. Is the opinion and judgment concerning the Montana law applicable rendered by District Judge W. J. Jameson, a former member of the Montana bar, so clearly wrong that it should be reversed on appeal?

STATUTE INVOLVED

The Montana statute involved is *53-109, R.C.M. 1947.* Its provisions are quoted and its history set forth by the Montana Supreme Court in the *Safeco* case *(142 Mont. 158 through 163; 382 P.2d at 176 through 178).* The pertinent provisions are likewise quoted in the opinion of the Ninth Circuit Court *(Appendix A, pp. 24-25).* Subparagraph (d) is quoted above under the subhead "Questions Presented."

STATEMENT

The impact of *Section 53-109, R.C.M. 1947,* and in particular subparagraph (d), on the meaning and intention of the terms "owned and non-owned" of motor ve-

hicles as used in liability insurance contracts was the sole issue involved in the Montana state court *Safeco* case. The conclusions of law by the Montana state trial court in that case were based upon the same controlling facts as the controlling facts in this case, and are the same conclusions of law upon which the opinion of the Ninth Circuit Court is based in this case. They were reversed by the Montana Supreme Court in *Safeco*. The arguments and California law urged upon the Montana Supreme Court by the respondent Northwestern Mutual in *Safeco* were the same as those advanced by the Ninth Circuit Court in its opinion in this case. They were all rejected by the Montana Supreme Court. On the same basic facts, the Montana Supreme Court reversed the conclusions of law now adopted by the Ninth Circuit Court, and considered and rejected the same California law and reasons now adopted by the Ninth Circuit Court. There is an irreconcilable conflict between the two cases.

a. *Controlling Facts Are Admitted and Undisputed.*

It is important to have in mind that the controlling facts are all admitted and undisputed. They are all carefully delineated in the original published opinion of the District Judge *(227 F. Supp. 978)*, and in his subsequent findings of fact and conclusions of law *(Appendix A, pp. 1-19)*.

b. *Facts of Safeco case.*

In the *Safeco* case, two policies were involved—one issued by Northwestern Mutual covered the operation of

motor vehicles "owned" by automobile dealer Bear Paw; one issued by *Safeco* covered the operation of motor vehicles "owned" by Dean. Bear Paw agreed to sell and Dean agreed to buy a Studebaker. The consideration was agreed upon. Dean traded in a Hillman car, and delivered it to Bear Paw which had the car on its lot for sale. Bear Paw in turn on May 10, 1960, delivered the Studebaker to Dean who thereafter had full possession and control. As far as the parties were concerned, the sale and transfer was completed. However, no Certificate of Title and Ownership of the Montana Registrar of Motor Vehicles was ever executed, assigned or delivered to Dean, and no new Certificate of Title and Ownership was ever applied for from the Montana Registrar of Motor Vehicles nor issued to Dean. In other words, it was undisputed that there was a failure to comply with the procedures for transfer of ownership required by *Section 53-109, R.C.M. 1947*. On May 11, 1960, Dean was involved in an accident. If Bear Paw was "owner" of the Studebaker, the Northwestern Mutual policy covered. If Dean was "owner" of the vehicle, the Safeco policy covered.

c. *Conclusions of Law By Montana Trial Court Reversed By Supreme Court.*

Reversal by the Montana Supreme Court in *Safeco* of the conclusions of law by the Montana trial court is significant. The trial court held (1) that there was a completed sale by Bear Paw to Dean under the general

law of sales; (2) that at the time of the accident Dean was the owner of the Studebaker; (3) that the Studebaker was not owned by Bear Paw as the word "owner" is used in the Northwestern policy; (4) that Dean was owner as the word "owner" is used in the Safeco policy; (5) that the Northwestern policy did not protect Dean, but that the Safeco policy did *(Appendix B, p. 40)*. The Ninth Circuit Court has made substantially the same holding in this case. Safeco apealed to the Montana Supreme Court from those conclusions of law by the trial court. The Montana Supreme Court reversed.

d. *Argument Submitted To and Rejected By Montana Supreme Court in Safeco Case.*

Pertinent portions of the appellate briefs procured and studied by District Judge W. J. Jameson are copied extensively in *(Appendix B, pp. 38-55)*.

Analysis of the following arguments from the appellate brief of Northwestern Mutual *(Appendix B, pp.43-45)* dramatically pinpoints the basis of the decision of the Montana Supreme Court in *Safeco* in its true perspective.

Both appellant Safeco and respondent Northwestern Mutual agreed in their appellate briefs that the basic issue was quite narrow:

a. "We think it will be agreed that the issue here is quite narrow: If Dean was the 'owner' of the Studebaker on May 11th the Safeco policy is responsible; if Bear Paw was the 'owner' then the Northwestern policy is responsible up to its limits, beyond which Safeco becomes responsible as the 'excess' insurer."

(Appel. Brief, page 6, Appendix B, p. 39.)

b. "At the time of the accident Dean owned a liability insurance policy issued by Safeco, and Bear Paw owned a lability insurance policy issued by Northwestern. If Dean was the 'owner' of the car on May 11th, the Safeco policy is responsible. If Bear Paw was the 'owner' on May 11th, Northwestern is responsible.

"The sole problem in the case is one of definition. What does the word 'owner' mean as used in two policies?"

(Resp. Brief, page 6, Appendix B, p. 45.)

Northwestern argued to the Montana Supreme Court: "The sole problem in the case is one of definition. What does the word 'owner' mean as used in the two policies?" *(Appendix B, p. 45.)* "What does the word 'owner' mean as used in the insurance policies written by the respective companies?" "Contracts of insurance are to be interpreted as other contracts and must be interpreted to give effect to the mutual intention of the parties" *(Appendix B, pp. 46-47). "Section 53-109(d), R.C.M. 1947, is a recording statute governing the record title as distinguished from ownership." "Section 53-133* defines ownership." *(Appendix B, p. 47.)* The meaning of the word "owner" was then discussed in the light of Northwestern's version of the "intention of the parties" when using the terms in the insurance contracts, and "practical considerations."

"Normally we would expect that the parties would intend a cut-off date governing the insurance company liability to be the date upon which the right to control the vehicle involved changed. The word "owner" therefore would, if interpreted in accord-

> ance with what the parties intended to be construed to include persons who, because of basic property rights, had a right of control and to exclude those who did not." *(Appendix B, pp. 47-48.)*

"The fact is that Dean drove the car as a matter of right under a claim of ownership." "Giving the word 'owner' a normal meaning, Dean has the insurance he bargained for." "As a practical matter the law gains nothing by the application of the unrealistic language of *Section 53-109(d)* to the interpretation of the word 'owner' as it appears in the policies under consideration." *(Appendix B, p. 48)* It was argued that Dean was the owner under the General Law of Sales, that "all parties are agreed it was intended that Dean was owner of the Studebaker" *(Appendix B, p. 49)*; that *Section 53-109(d)* is a registration law only and should not control the definition of ownership; that "a literal application of *Section 53-109(d)* is unrealistic" *(Appendix B, p. 49)*; that the statute was not intended to alter the basic law of torts or contracts, that:

> "It should be remembered here that if 53-109d is held to govern ownership, that it will govern it whole hog and that there is no place short of the actual issuance of the registration certificate at which the court can say that ownership has changed. Since the results which would follow such a holding are so utterly absurb and will result in such manifest injustices the court should not so hold unless compelled by the statute to do so. There is no such statutory compulsion."
>
> *(Appendix B, pp. 50-51.)*

It was urged that another section, *53-133(f), R.C.M. 1947*, does define and should control the meaning of the word "owner" as used in insurance contracts *(Appendix B, p. 51*: Note: A comparable California statute was cited and quoted in *Yoshida* relied upon by Ninth Circuit Court. Application of both the California statute and *53-133 (f) R.C.M.* to facts such as these was specifically rejected by the Montana Supreme Court in *Safeco* as pointed out hereafter in subparagraph (e). Northwestern further argued that a California statute the same as *Section 53-109* is a registration law *(Appendix B, p. 52)*:

> "For about two decades the California Courts have struggled with the problems which the Montana Court here faces. After some indecision the California Courts have held that 'ownership does change despite the registration law and that the omnibus clause of a vendor's insurance policy is not liable where there has been a failure to comply with the registration law.' Because of this long struggle and because the Callfornia Courts have reached results which do not ignore the realities, we believe the California cases to be persuasive.
>
> * * *
>
> "Ownership as distinguishable from title in California is not controlled by the registration law."
>
> *(Appendix B, p. 53.)*

After urging that the California court decisions were persuasive and discussing 13 different California decisions in some 14 printed pages, Northwestern concluded: "Clearly in California the counterpart of *Section 53-109(d)* does not govern the meaning of the word

'owner'; does not in a case such as this make the omnibus clause effective" *(Appendix B, pp. 53-54)*. (As discussed hereafter, the Ninth Circuit Court bases its opinion on *Yoshida,* and *Teixeira. Yoshida,* a California case decided by the Ninth Circuit Court, interprets and applies the same; identical principles of California law urged upon the Montana Supreme Court in *Safeco* by Northwestern Mutual, and considered by, but flatly rejected by, the Montana Supreme Court. *Teixeira* was a Hawaiian case. It simply cites and relies upon the *Yoshida* case.)

e. *Compare the Foregoing Conclusions of Law (c) and the Foregoing Argument (d) with the Decision of The Montana Supreme Court in Safeco.*

The Montana Supreme Court reversed the foregoing Conclusions of Law of the Montana Trial Court, and the language which it used in rejecting the foregoing arguments and California law advanced in brief by respondent Northwestern is most revealing. After reviewing the legislative history of *Section 53-109*, and quoting and referring to what is substantially the present *Section 53-109(d)* (quoted above under "Questions Presented"), the Montana Supreme Court said:

> "Here for the first time is a specific provision that any intended transfer not in compliance with the statute, is incomplete and invalid for any purpose and while certain minor amendments have been made in subsequent years it still remains substantially the same, and now appears as subdivision (d) of

Section 53-109, R.C.M. 1947, supra." *(142 Mont. at 162; 382 P.2d at 177.)*

Two prior Montana decisions were then discussed, following which the court said:

a. "The above cited decisions do not support the contention of the defendants that the motor vehicle statutes are merely recording statutes.

"Defendants lay great stress upon subdivision (d) of Section 53-109, denominating it a registration law.

"It is true that the motor vehicle code covers the registration of motor vehicles, but this is under sections 53-107, 53-108, 53-114 and 53-122, R.C.M. 1947, *and not under section 53-109 which deals with the transfer of ownership of the motor vehicle.*" (Emphasis supplied; *142 Mont. at 163; 382 P.2d at 178.*)

b. "While defendants assert great problems will arise if section 53-109 is interpreted to mean what it says, we fail to follow such reasoning. The statutory requirements are quite simple, * * *." *(142 Mont. at 163; 382 P.2d at 178.)*

c. "There is nothing unrealistic, technical or artificial about this simple procedure *for the transfer of ownership* of a motor vehicle. * * * If the transfer has not been made in compliance with the statute and the registrar by reason thereof *does not issue a new certificate of ownership*, clearly there was *no transfer of ownership* in its inception." (Emphasis supplied; *142 Mont. at 164; 382 P.2d at 178-179.)*

d. "We must adhere to the tenor of our former interpretations that the provisions of the motor vehicle code provide the exclusive method of accomplishing a valid sale and transfer of a motor vehicle.

"No attempt having been made by either Dean or Bear Paw to comply with section 53-109, supra,

we must hold there was never a completed sale and the judgment must be reversed." *(142 Mont. at 164-165; 382 P.2d at 179.)*

f. *Facts of This Case.*

What are the undisputed facts of this case? *227 F. Supp. 978; Appendix A, pp. 1-19.)* Ehart was register-owner of a 1949 Ford passenger automobile. The Montana registrar of motor vehicles had issued and delivered to Ehart the Certificate of Title and Ownership contemplated by *Section 53-109*. Ehart died in 1957 leaving McCormick as his sole heir. McCormick died, and his widow, who was his sole heir, agreed to sell the car to Albert Kinney. Albert Kinney paid over the money and took possession in 1958. He considered himself the owner and kept possession of the car until December 3, 1960, when his son Jerry had a fatal accident while driving the car. There was never any compliance with provisions of *Section 53-109*. Mrs. McCormick had delivered to Albert Kinney a "certificate of registration and tax receipt" issued by the County Treasurer when annual license fees and taxes are paid. Such is not a controlling fact. The controlling fact admitted and undisputed is that the Certificate of Title and Ownership required by *Section 53-109, R.C.M. 1947,* and issued by the Montana Registrar was never delivered to nor assigned to Kinney by Mrs. McCormick; that Kinney had never applied to the Montana Registrar for one; and that the Montana Registrar had never issued to Kinney the new Certifi-

cate of Title and Ownership required by *Section 53-109(d)*.

Prior to December 3, 1960, respondent had issued to Albert Kinney a family automobile liability policy. The only pertinent provisions were in the omnibus clause defining persons insured with respect to operation of a non-owned automobile, and the provisions of *Section 53-109* which are incorporated by law in the insurance contract. Those insured were:

"(b) with respect to a non-owned automobile,

* * *

"(2) any relative with respect to a private passenger automobile * * * not regularly furnished for the use of such relative; * * *.

"non-owned automobile means an automobile * * * not owned by the named insured or any relative, other than a temporary substitute automobile! * * *"

(Appendix B, p. 8)

Montana has long adhered to the basic rule expressed by this Court in *United States ex rel Von Hoffman v. Quincy, 4 Wall 535, 18 L. Ed. 403, 408,* that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms *(City of Philipsburg v. Porter, 121 Mont. 188 at 193; 190 P.2d 676 at 678)*. The insurance contract, including the language of *Section 53-109* as part of its contractual provisions, was in effect on December 3, 1960.

g. *The Same Factual and Legal Issue Involved in Safeco is Involved in This Case.*

The same simple issue is involved as was before the Montana Supreme Court in *Safeco*. If Albert Kinney was the "owner" of the 1949 Ford on December 3, 1960, there was no coverage. If Albert Kinney was not the "owner" of the Ford, there was coverage.

As indicated, District Judge Jameson procured and studied the appellate briefs submitted to the Montana Supreme Court in *Safeco*. Details of the facts were distinguishable in many respects, but the critical facts were and are the same, *First,* in each case there was an agreement to sell and purchase a motor vehicle, a payment of the consideration, a delivery of possession and control of the vehicle, and, as far as the parties were concerned, there was a completed sale. *Second,* there was a total failure to comply with the simple, specific, procedures required by *Section 53-109*. *Third*, an insurance company had issued a liability policy under which coverage depended upon whether the motor vehicle was non-owned by the intended purchaser. *Fourth*, in each case there was a contention that *Section 53-109* was nothing more than a registration statute affecting the transfer of "legal title" only. *Fifth*, in each case, there was a contention that it was the concept of ownership intended by the insurance company in the contract of insurance as commonly accepted and understood in everyday sale transactions which controlled, and not the provisions of *Section 53-109*.

h. *Ninth Circuit Court Opinion Directly Contradicts and Conflicts with the Montana Supreme Court Decision in Safeco.*

The Montana Supreme Court flatly rejected all arguments of Northwestern Mutual. It held in unambiguous language that *Section 53-109* is not merely a recording statute or registration law, but deals with the "transfer of ownership" of a motor vehicle; that the provision in the statute that "any intended transfer" of ownership is incomplete, invalid and ineffective "for any purpose" unless the statutory procedure has first been complied with is plain, simple, and specific; that the statute means what it says, and prescribes a simple procedure for the transfer of ownership; that any intended sale or transfer of ownership is void "from its inception" unless the statutory procedure has first been complied with; that compliance with the statute is the exclusive method for transferring ownership, and any intention of Northwestern Mutual to the contrary in its contract of insurance, any different concept of ownership as the word "owner" is used in the contract of insurance, is invalid and ineffective; that because of the failure of the parties to comply with the simple procedures prescribed by *53-109*, Bear Paw was the owner as the term "owner" was employed in the Northwestern Mutual contract of insurance, and Dean was a "non-owner"; and that the Northwestern Mutual contract of insurance covered the loss *(142 Mont. 155, 382 P.2d 174)*.

The Ninth Circuit Court concedes that the transfer from Mrs. McCormick to Albert Kinney was a voluntary transfer governed and controlled by *Section 53-109*. "Since it was not so made, *Section 53-109(d)* declares that 'said intended transfer shall be incomplete and not be valid or effective for any purpose.'" *(Appendix A, p. 27.)* It then proceeds, however, to disagree with the Montana Supreme Court holding in *Safeco* by stating:

> "As we read Section 53-109(e), its only effect is that legal title to an automobile cannot pass to a voluntary transferee in the absence of compliance with the statutory procedure. * * * The crucial question is not the identity of the holder of the legal title but whether or not the car was "non-owned" by Kinney as the term is employed in the insurance contract."
>
> *(Appendix A, p. 28.)*

This is precisely the same conclusion of law found by the Montana lower court in *Safeco (Appendix B, p. 40)* reversed by the Supreme Court, and the same argument of respondent Northwestern Mutual to the Montana Supreme Court on appeal partially quoted above *(Appendix B, pp. 43-55)*, rejected and refused and reversed by the Montana Supreme Court. The Ninth Circuit Court then cites, quotes and relies upon two of its prior decisions —*Matsuo Yoshida v. Liberty Mutual Insurance Co., 9th C.C., 1957, 240 F. 2d 824,* and *Teixeira v. Globe Indemnity Co., 9th C.C., 1965, 349 F. 2d 502 (Appendix A, pp. 28-31).* The *Yoshida* opinion was written by Cir-

cuit Judge Barnes, one of the three Judges who sat on this case. California law was involved. The vehicle was in the possession of a conditional vendee. The California statute defined as an "owner";

> "the person entitled to the possession of a vehicle as the purchaser under a conditional sales contract."

This statute of California is substantially the same statute as *53-133(f), R.C.M. 1947*, urged upon the Montana Supreme Court in *Safeco* by Northwestern Mutual *(Appendix B, pp. 51-52)*. The Montana section reads:

> "f. The term 'owner' shall include any person, firm, association or corporation owning or renting a motor vehicle, or having the exclusive use thereof, under lease or other wise, and shall also include a contract vendee." *Section 53-133(f), R.C.M. 1947.)*

The Montana Supreme Court rejected the argument:

> "As to section 53-133, R.C.M. 1947, the statute defining words and phrases in the motor vehicle code, it clearly states what their construction shall be 'unless the context may otherwise require'. If there exists any conflict, which we do not perceive, in our view the context of section 53-109 requires the interpretation as herein stated."

The *Yoshida* opinion cites and applies another California statute, and a prior decision interpreting California law to the effect that the statutory definition of "owner" was not necessarily controlling, that the words of the contract of insurance were to be taken in their ordinary and popular sense. Is it not significant that the Montana Supreme Court in *Safeco* heard and rejected the same argument from Northwestern Mutual,

and heard and rejected the applicability in Montana of the California statutes and cases *(Appendix B, pp. 46-54)*? We recognize that the Ninth Circuit Court is constrained to follow the dictates of *Yoshida* in California while applying California law. *Yoshida* does not, however, express the law applicable in Montana.

Teixeira is an opinion by Circuit Judge Jertberg, another of the three judges who sat on this case. He was construing Hawaiian law. He cited and relied upon the *Yoshida* decision. Again we point out that *Yoshida* is good law in California, and *Teixeira* is good law in Hawaii, but their holdings have been rejected by the Supreme Court of Montana, and they do not express Montana law.

The Ninth Circuit Court places undue emphasis on the fact that in *Safeco* the intended sale had been completed for only one day, whereas Kinney's was for two years *(Appendix A, p. 30)*. Such is an artificial and inconsequential distinction. Important in each case is the fact that the parties had in fact completely consummated their sale transaction as far as they were concerned, and not the length of time for which it had been consummated. It was the effect of *Section 53-109(d)* on the completed and consummated transaction with which the Montana Supreme Court was concerned, and not upon the length of time which had elapsed thereafter. The Montana Supreme Court held that "if the transfer has not been made in compliance with the statute, and

the registrar by reason thereof does not issue a new certificate of ownership, clearly there was no transfer of ownership *in its inception.*" The Ninth Circuit Court also talks about the design and intention of a garage owner's liability policy; the coverage expectations of the parties; the actuarially determined premiums for risks involved, and the like *(Appendix A, pp. 32)*. There was and is no evidence in this record warranting such discussion. In addition, the Court said that to hold Albert Kinney was not the owner of the Ford within the meaning of the policies in suit would do violence to the intention of the parties and to traditional legal concepts of ownership *(Appendix A, pp. 35)*, both of which reasons were argued to *(Appendix B, pp. 46-52)*, and rejected by the Montana Supreme Court which then held in *Safeco* that the specific language of *Section 53-109(d)* is controlling *(142 Mont. 155, 382 P.2d 174)*. Finally, the Ninth Circuit Court said that to so hold would do violence to "our own sense of right and wrong" *(Appendix A, pp. 35)*, a reason utterly beside the point as long as the state Supreme Court has already spoken. In any event, all such discussion is wholly immaterial. Important is the plain and obvious conclusion that the five basic controlling facts in the *Safeco* case are identical with those in this case; that the conclusions of law by the Ninth Circuit Court in this case are the same as those reached by the Montana lower court in *Safeco*, and which were reversed by the Montana Supreme Court;

that the California law relied upon and applied here by the Ninth Circuit Court is the same as the California law which was argued to and rejected by the Montana Supreme Court; and that the reasons advanced by the Ninth Circuit Court for its holding were rejected by and are in direct conflict with the holding and result reached by the Montana Supreme Court. The opinion of the Ninth Circuit Court in this case is diametrically contradictory to that which was considered and decided and held by the Montana Supreme Court on the same controlling facts in the *Safeco* case.

REASONS FOR GRANTING THE WRIT

1. It is plain and obvious that the opinion of the Ninth Circuit Court in this case is a flagrant violation of the principles of law enunciated by this Court in

Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the particular state involved whether declared by its legislature in a statute, or by its highest court in a decision. In this case the law applicable and controlling is expressed both in a Montana statute and in a controlling decision of the Montana Supreme Court. In holding directly to the contrary the opinion of the Ninth Circuit Court in this case is an obvious, clean cut volation of the principles of law first enunciated by this Court in the *Erie* case, and adhered to at all times since.

2. In creating a situation in which a trial on the same basic and controlling facts would require one result if tried in a Montana state court, and a directly opposite result if tried in a Montana federal court, the opinion of the Ninth Circuit Court in this case is a violation of the principles of law enunciated by this Court in

Guaranty Trust Co. of New York v. York, 326 U.S. 99, 89 L. Ed. 2079, 65 S. Ct. 1464.

In all cases where the federal court exercises jurisdiction solely because of diversity of citizenship, the outcome of litigation in the federal court should be substantially the same as it would be if tried in the state court, so far as legal rules determine the outcome.

3. It is the duty of the federal court to ascertain and apply the state law in accordance with the controlling decision of the highest state court.

Huddleston, v. Dwyer, 322 U.S. 232, 88 L. Ed. 1246, 64 S. Ct. 1015.

4. A federal court is not warranted in refusing to ascertain the basis of the existing state ruling, and in refusing to follow it, on the conjecture that the Supreme Court of the State may modify it, or even set it aside, in the future.

Meredith v. City of Winter Haven, 320 U.S. 228, 88 L. Ed. 9, 64 S. Ct. 7.

5. When the District Judge who initially decides the issue has practiced law in the forum involved, and

is versed in the local law, and when he has investigated and carefully studied the local law applicable, his considered judgment should not be reversed on appeal unless it is clearly wrong.

Bernhardt v. Polygraphic Company of America, 350 U.S. 198, 100 L. Ed. 199, 76 S. Ct. 273;

Bellon v. Heinzig, Mont., 9th C.C., 347 F. 2d 4.

6. The sale, financing, repair and maintenance, and governmental control of operation, of motor vehicles, is of vast importance in the everyday life of Montana's citizens and business interests. Any legal confusion with respect to the intent, meaning, and application of *Section 53-109, R.C.M. 1947*, to ownership of motor vehicles has a general public impact far greater than the impact on this particular plaintiff in this particular case. Following the *Safeco* decision by the Montana Supreme Court, Montana lawyers had an unambiguous guide by which to advise clients with respect to the specific identity of the owner of a motor vehicle in each and every case. There was no uncertainty, no variance from case to case. Now, however, under this conflicting decision of the Ninth Circuit Court, there is no specific guide line. It varies from case to case depending upon the vagaries of undisclosed intentions. It is completely up in the air, uncertain, and indefinite. The opinion affects, of course, all insurance contracts, performance

bonds, and indemnity bonds whether for material damage or liability. Its ramifications are even greater, however. It extends to and affects all other controversies where determination of motor vehicle ownership is involved — liens, attachments, third party claims after attachment, claim and delivery actions, finance contracts, transfers by operation of law, ownership under Montana's Safety Responsibility Act, impoundment or confiscation or installation of safety equipment by order of a public official, and the like.

Equally distressing will be the struggle behind the scenes shopping for the favorable decisional forum — the federal court in one case, the state court in another.

We respectfully submit that the legal confusion caused by such an obvious conflict between the opinion of the Ninth Circuit Court and the *Safeco* decision of the Montana Supreme Court qualifies this case for consideration under the limitations expressed in Rule 19, Supreme Court Rules.

7. Could the three Ninth Circuit Judges (none of whom were Montana practitioners) have been subconsciously biased by a prior indoctrination with the principles of California law which they applied in reversing a Montana District Judge applying Montana law in a Montana case? The present opinion of the Ninth Circuit was written by Circuit Judge Ely Joined by Circuit Judges Barnes and Jertberg. It is based entirely on the

prior *Yoshida* and *Teixeira* decisions by the same court.

The *Yoshida* opinion was written by Circuit Judge Barnes. It was a California case, and he was construing and applying principles of California law. He necessarily became indoctrinated in the soundness of those California principles before he could write the *Yoshida* opinion. As indicated above, there can be no doubt that it is the same California law that was urged upon, considered, and rejected by the Montana Supreme Court in *Safeco*.

The *Teixeira* case involved Hawaiian law. The opinion was written by Circuit Judge Jertberg. It simply accepted, adopted, and applied the principles of California law applied in *Yoshida*. Once again we note that to arrive at that conclusion, Circuit Judge Jertberg necessarily became indoctrinated with the applicability of the principles of California law, all of which, however, were rejected in Montana by the Montana Supreme Court in *Safeco*.

In our research, we have read with great interest the decision of the California Supreme Court in Banc, *Stoddart v. Pierce, 1959, 346 P.2d 774*. The case involved California statutory personal injury liability of "every owner of a motor vehicle" merely because of ownership without regard to vicarious liability under respondeat superior. Montana has no such statute. The decision refers to section 186 of the California code identical with *53-109(d), R.C.M. 1947*, and states in part:

> "Insofar as the legal title of the party failing to comply with the statutory requirement, or his liability to a third person is concerned there is little doubt that the quoted language means just what it says. But this does not mean that no equitable title passes from a defaulting transferee, or that as to either of them the transfer is entirely ineffective. Such an interpretation would defeat the primary purpose of the statute and relieve a defaulting transferee of liability to a person injured in an accident involving the vehicle which he has failed to register." *(P. 789.)*

Note the similarity of this legal conclusion to the legal conclusion of the Ninth Circuit Court in the opinion in this case written by Circuit Judge Ely. The law firm of which Circuit Judge Ely was then a member participated as successful amicus curiae in that case. From that experience Circuit Judge Ely must have been indoctrinated with the principles of California law there enunciated, all rejected in 1963 by the Montana Supreme Court in *Safeco.*

The possibility that these Ninth Circuit Judges were subconsciously influenced by their prior indoctrination with the principles of Californa law which they have now applied in this Montana case cannot be ignored. It seems plain and obvious to petitioner that the same, identical principles of California law were urged upon, considered, and rejected by the Montana Supreme Court in *Safeco.* We submit that the bare possibility of an unconscious bias in favor of California law compels this Court under its Rule 19 to accept this petition and examine the basis of the *Safeco* decision.

CONCLUSION

The facts are admitted and undisputed. The issue, we believe is clear: Is the present opinion of the Ninth Circuit Court in conflict with what was urged, considered, and decided by the Montana Supreme Court in *Safeco*; does the opinion of the Ninth Circuit Court negate the plain and unambiguous language of *Section 53-109 (d), R.C.M. 1947*, as interpreted by the Montana Supreme Court in *Safeco*? The answer, we believe, is equally clear: there is an irreconcilable conflict between the two decisions. The importance of not having two conflicting decisions with respect to the application of Montana law arising out of the same controlling facts — one by the Montana Supreme Court, and the other by the Ninth Circuit Court of Appeals — is apparent. The importance of forestalling and correcting such an obvious violation of the principles of *Erie-Tompkins* is equally apparent. We respectfully submit that in view of the importance and simplicity of the only question presented, the lack of any doubt as to the basis, purpose and intent of the decision of the Montana Supreme Court, and the urgency of an early decision in order to avoid the embarrasing effects of such two contradictory decisions, the petition for a writ of certiorari should be granted, and the judgment of the Ninth Circuit Court of Appeals should forthwith be reversed, with instructions for such further proceedings as may be necessary

to make the judgment of the Ninth Circuit Court consistent with the interpretation of the Montana state statute by the Montana Supreme Court as enunciated in the findings of fact and conclusions of law of District Judge W. J. Jameson. If, however, this petition should be granted but the court should determine that oral argument or other further proceedings should be required in this court, then it is requested that the cause be placed on the summary docket and advanced for argument during the present term, and that in the interest of the earliest possible hearing that this petition be accepted as the brief of petitioner on the merits.

Respectfully submitted,

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